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Supreme Court, U.S.
FILED
NOV 12 2002
OFFICE OF THE CLERK

No. 02-498

In the Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

HARRY BERGER and BERNARD CUTLER, individually and on behalf of a class similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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November 12, 2002

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

27 pp

QUESTION PRESENTED

Whether the commencement of a class action tolls the limitations period for intervening class members to bring claims on behalf of a class where there has been an earlier denial of class certification only because of a defect in the class representative and where no determination was made whether the underlying class is appropriate for class certification?

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STATEMENT OF THE CASE

In light of Petitioner's truncated and one-sided Statement of the Case, Respondents submit this Statement to clarify facts relevant to the Petition.

A. Jasmine's Fraudulent Public Offering

This action presents a classic case of securities fraud in an initial public stock offering. In December 1993, Jasmine Ltd. issued stock pursuant to a Registration Statement (the "Registration Statement"). The Registration Statement included Jasmine's financial statements for the periods ending, September 30, 1992 and 1993. Those financial statements were pure fiction. The only difference between this case and other securities fraud cases is that Jasmine's CFO who completed the 1993 financial statements has admitted that those financial statements were materially misstated.

Prior to the time of its public offering, it is undisputed that Jasmine was insolvent. Jasmine was a shoe importer that obtained its shoes through a foreign buying agent, McKowan Lowe & Company, Ltd. ("McKowan"). Jasmine owed McKowan $15 million, and Jasmine had no legal way by which it could repay McKowan. Jasmine and McKowan, through certain officers and employees, conspired to misstate Jasmine's financial statements to enable Jasmine to conduct an initial public offering to obtain money to pay Jasmine's debt to McKowan.

Jasmine and McKowan conspired to omit approximately $13 million of Jasmine's debt to McKowan from Jasmine's financial statements. They also conspired to overstate Jasmine's net income by, among other things, creating a sham sale of a Jasmine asset, an entity called

Lucky Leader Trading Ltd., to McKowan. That transaction accounted for approximately 70% of Jasmine's reported net income in 1993. These material misstatements were necessary to enable the IPO to proceed.

A key step necessary for the IPO's success was for Jasmine to retain the then well-respected accounting firm of Arthur Andersen, LLP, as its independent auditor for Jasmine's financial statements for the period ending September 30, 1993. Andersen's involvement was necessary to create the appearance of reliability for Jasmine's financial statements to be included in the Registration Statement. Andersen complied by issuing a fraudulent audit opinion dated November 22, 1993, which was included in the Registration Statement.

Jasmine continued making material misstatements in its subsequent public filings, including its quarterly Form 10-Q's and its December 15, 1994 Form 8-K regarding Andersen's withdrawal from the 1994 Jasmine audit engagement. The Form 8-K failed to disclose "that Andersen, during its audit of the 1994 financial statements, withdrew after disagreements with Jasmine's management which could have caused it to modify its previously unqualified 1993 audit report." (App. 22a.) Andersen was complicit in that omission by failing to correct the deceptive Form 8-K. (Amended Complaint ¶54.)

The material misstatements in the 1993 financial statements are well-established. Edward Maskaly, Jasmine's CFO, and Norman Goldenberg, Jasmine's Operations Manager, have admitted that Jasmine's 1993 financial statements were materially misstated. (*See* Information and Pleas of Edward Maskaly and Norman Goldenberg, included as Exhibits A through D to the

Lodging filed with this Court.)[1] Tony Ngai and Evelyn Wong, who were officers and directors of McKowan, each executed certifications affirming that Jasmine actually owed McKowan $16 million in 1993. Three other Jasmine principals and officers remain under indictment related to the misstatements in Jasmine's 1993 financial statements. (*See* Indictment of Samuel Mangel, Irving Mangel and Thomas Ciocco, included as Exhibit E to the Lodging filed with this Court.) Additionally, the SEC obtained consent judgments and fines against several Jasmine and McKowan officers.

B. The District Court Proceeding

On November 27, 1995, Respondent Harry Berger filed a class action on behalf of Jasmine's defrauded investors. Berger, who invested more than $15,000 in Jasmine's fraudulent offering, moved the district court to certify the class, but the district court denied the motion because it found that Berger did not personally satisfy the typicality and adequacy requirements. After that denial, Respondent Bernard Cutler promptly moved to intervene to represent the class. On February 19, 1999, while his motion for intervention was pending, Cutler moved for certification of a settlement class for the state law claims, which included a payment of $750,000 from defendant Fishbein, Andersen's predecessor auditor that had been replaced in favor of Andersen's reputation. On September 23, 1999, the district court denied Cutler's motion to certify a settlement class, accepting Andersen's argument

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[1] Exhibits A through E have been lodged with the Clerk. They were not part of the Appellate record, but have been filed with the District Court in this action.

that "[t]he very existence of the issue of Mr. Cutler's [possible] reliance on nonpublic information renders him an atypical and inadequate representative."[2] (App. 32a.)

On February 2, 2000, Cutler moved for class certification on all counts, but indicated that, given the prior ruling, his motion was limited to the Securities Act §§ 11 and 12 counts that were unaffected by the prior ruling on the unique defense of non-reliance. On June 30, 2000, the district court declined to evaluate Cutler as a representative of the class as to Securities Act claims solely on the ground that the statute of limitations had run against pursuing those claims on behalf of a class.

C. The Court of Appeals Decision

In reversing the district court, the Third Circuit carefully analyzed the rationales for tolling statutes of limitations in class actions as set forth in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), that: "class actions are 'designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.' If the claims of unnamed plaintiffs were not tolled, claimants would have an incentive to file claims themselves to protect their causes of action, 'precisely the multiplicity of activity which Rule 23 was designed to avoid.'" (App. 6a (citations omitted).) The court of appeals also recognized that tolling of absent class mem-

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[2] Although Andersen raised the "issue" of possible reliance on non-public information that the district court referred to, there is no such issue. There is no evidence to support Andersen's claim that Cutler had any non-public information about Jasmine's financial condition.

bers' claims did not conflict with the functions of statutes of limitations because the defendants are put on notice of the absent class members' claims by the filing of the class action. *(Id.)*

The Third Circuit found that the line of cases following the decision in *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987), did not apply to Cutler's class claims. The court recognized that the *Korwek* line of cases applied to factual situations where the class action itself, not the class representative, was defective. (App. 13a.) ("Indeed, in *Korwek*, the court itself distinguished the situation before it and a situation more similar to this one, explicitly 'leav[ing] for another day the question of whether the filing of a potentially proper subclass would be entitled to tolling under *American Pipe*.'") *(Id.)*

The Third Circuit closed its opinion with a clear statement of the applicable tolling rule:

> In keeping with Supreme Court precedent and our own, we hold that the class claims of intervening class members are tolled if a district court declines to certify a class for reasons unrelated to the appropriateness of the substantive claims for certification.

(App. 15a.)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Arthur Andersen's principal argument for granting the Writ is its claim that the circuits are deeply split over the tolling issue. However, the purported split is an artificial construct. Close examination of the cases Andersen cites reveals two unmistakably distinct lines of decisions, each

analytically sound, that distinguish between (1) those cases where tolling was not allowed because the underlying class was not and could not properly be certified, and (2) those cases where there was no determination of the propriety of the class and the only reason for denying certification was because of a defect in the class representative. As the Third Circuit held, this case falls comfortably in the latter category and more strongly so because the district court in an earlier opinion observed that the underlying class of defrauded securities purchasers easily met the requirements of Rule 23.

Andersen next argues that policy reasons support its argument that no tolling should be allowed for class claims. However, Andersen misstates these policies. In distinguishing the two lines of decisions, the Third Circuit found that tolling for class claims where there has been no determination that the underlying class is unsuitable for certification is fully consistent with the twin rationales for the tolling rule articulated by this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). First, class actions are "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Id.* at 550. Second, as this Court emphasized in *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980), class actions serve as the only practical means by which small claimants can effectively pursue their claims. Further, this Court previously held that the tolling rule is consistent with the important functions served by the statutes of limitation: providing defendants with timely notice of claims against them and avoiding stale claims. *American Pipe*, 414 U.S. at 554-55.

Andersen argues for a rigid unyielding tolling rule that once class certification has been denied *for any reason*—

even where, as here, there is a proper underlying class—no tolling for class claims should be allowed because to do so would invite an unending stacking of class claims to the detriment of judicial efficiency and the rights of defendants. Andersen is wrong because as numerous courts have held, including the Third Circuit here, the risk of prejudice to defendants is minimal because the filing of a class action puts defendants on notice of the claims against them. Furthermore, the lower courts have all the tools necessary—and use them regularly—to prevent abuse to the judicial system by attempts to relitigate a succession of defective class actions. The Third Circuit was correct in holding that the severely restricted tolling rule Andersen argues for is not consistent with judicial efficiency, and, instead, would result in absent class members moving to intervene or filing separate lawsuits to protect their rights causing "precisely the multiplicity of activity which Rule 23 was designed to avoid." *American Pipe*, 414 U.S. at 551.

1. There Is Neither A Wide Nor Narrow Conflict In The Circuits Over The Tolling Rule

The gist of Andersen's argument is that the First, Second, Fifth, Sixth and Eleventh Circuits have created an unforgiving tolling rule, in conflict with the Third Circuit here, that once class certification has been denied for any reason, *American Pipe* tolls the limitations period, but only for later filed *individual* claims asserted by putative class members and not for *class* claims. *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998); *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988); *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987); *Salazar-Calderon v.*

Presidio Valley Farmers Ass'n, 765 F.2d 1334 (5th Cir. 1985).

However, in each of those cases, the circuit courts (with the possible exception of *Griffin* that we discuss below) affirmed a definitive district court's holding that the underlying class was improper. In *Basch*, the First Circuit affirmed the district court's holding that after four different tries by various proposed class representatives, the underlying class could not be certified because individual issues predominated. 139 F.3d at 7 and 8 n.4. In *Korwek*, the Second Circuit affirmed the district court's holding of a "definitive determination of inappropriateness of class certification" because the alleged class of futures contracts purchasers was unmanageable, and a second attempt at class status that simply repeated the same claims could not cure the problem of unmanageability. 827 F.2d at 879. The holding in *Korwek* is explicitly limited to the narrow question of whether the tolling rule in *American Pipe* applies to "permit the filing by putative class members of a subsequent class action nearly identical in scope to the original class action which was [for unmanageability] denied certification." *Id.* at 876.[3] In *Salazar*, a complex labor immigration case, the Fifth Circuit affirmed the district court's order denying certification because the court found that common issues could not predominate and class status would not be superior to individual claims. The Fifth Circuit cited *American Pipe* and held, but with no analysis, that once

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[3] It is telling that Andersen omits the crucial exception recognized in *Korwek*—as quoted by the Third Circuit here: "This Court notes that it leaves for another day the question of whether the filing of a potentially proper subclass would be entitled to tolling under *American Pipe*." *Id.* at 879.

the first class certification petition was denied because of a defect in the underlying class there could be no piggybacking "for any subsequent petitions *involving the same class*." 765 F.2d. at 1351 (emphasis supplied). In *Andrews*, the Sixth Circuit affirmed the district court's denial of class certification in a Title VII case because the named plaintiffs failed to exhaust administrative remedies within the required time period, and equitable tolling could not be applied even to extend the time in which individual plaintiffs could file administrative complaints. The district court held that there could be no tolling for class claims, and the Sixth Circuit agreed, without reasons or analyses, but simply citing *Korwek, Salazar* and *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), quoting those courts as warning against abuse by piggybacking and repetitive filings. 851 F.2d at 149.

Andersen argues that the Third Circuit decision shows that the circuit courts are deeply split when its decision is measured against *Basch, Korwek, Salazar,* and *Andrews*. However, Andersen fails to meet in any meaningful way the basic factual and analytic distinction between the Third Circuit's decision and the cases Andersen cites to support its argument that the circuit courts are "deeply split" over the tolling rule. That basic distinction is that in each of the cases Andersen relies on, as the Third Circuit correctly observed, the plaintiffs were "attempting to resuscitate a class that a court has held to be inappropriate as a class action." (App. 10a.)

Here, there was no definitive finding or even a general observation that the underlying class was in any way defective. To the contrary, although the district court made no formal ruling, it found that there was sufficient numerosity and commonality of questions of law and fact to merit class certification. (App. at 4a.) There is nothing

surprising about that observation by the district court. The claims by the putative class in the case under review are garden variety federal securities law claims asserting class-wide liability in connection with Jasmine's fraudulent initial public offering, particularly the Securities Act Sections 11 and 12(2) claims that do not require proof of reliance. It would defy common experience with underwritten initial public offerings, and hundreds of similar cases, for Andersen to argue that a properly certifiable class of defrauded securities purchasers does not exist in this case.

Perhaps the most convincing evidence that Andersen is wrong in arguing that the circuits are deeply split on the tolling issue is demonstrated by the district courts' observations that there is no split at all, but simply two separate lines of decision based on two very different factual scenarios. And it is the district courts that on a regular basis are required to deal with the issues of when and when not to permit tolling for class claims. An examination of these cases demonstrates that the district courts have no problem in making these distinctions, and they do so comfortably on both a pragmatic and analytically-sound basis.

In *Shields v. Washington Bankcorporation,* No. CIV. A. 90-1101 (RCL), 1992 WL 88004 (D.D.C. Apr. 7, 1992), the district court initially denied class certification finding that the first plaintiff could not be an adequate representative. A second plaintiff moved to intervene but could qualify as a class representative only if the statute of limitations was tolled. In a comprehensive review of the tolling issues beginning with *American Pipe* and *Crown Cork & Seal*, the district court distinguished *Korwek* and *Salazar* as cases where the courts concluded that no underlying class could be certified. The *Shields*

court allowed intervention of the second plaintiff as a class plaintiff observing that the putative class claims for securities fraud were plainly "appropriate for resolution through a class action suit." 1992 WL 88004, at *2.

In Re Quarterdeck Office Systems, Inc., Sec. Litig., No. CV-92-3970-DWW (GHKX), 1994 WL 374452 (C.D. Cal. Mar. 24, 1994), presented a similar situation. In a securities fraud case similar to the case under review, the defendants argued against class tolling and posited that the courts were deeply split on when to apply the tolling rule. After a careful review of the same cases Andersen cites here, the district court had no trouble disposing of this claim. "However these cases are not conflicting; they merely deal with two different scenarios." 1994 WL 374452, at *3.[4]

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[4] In footnote 7 at p. 19, Andersen argues that the district courts are also divided on the class tolling issue. However, Andersen misstates those cases. In *Fleming v. Bank of Boston Corp.*, 127 F.R.D. 30, 31, 34 (D. Mass. 1989), *aff'd sub nom., Fleming v. Lind-Waldock & Co.*, 922 F.2d 20 (1st Cir. 1990), the court held that intervention of an absent class member was inappropriate where the underlying claim was dismissed on summary judgment, class certification was never addressed, *and* the class claim allegations were not added to the complaint until *after* the statute of limitations had expired. In *Fleck v. Cablevision VII, Inc.*, 807 F. Supp. 824, 826 n.4 (D.D.C. 1992), the court denied class certification because "[t]his court does not find that this case would be most appropriately resolved as a class action." Andersen also fails to cite cases in which the district courts had no trouble distinguishing the two lines of decisions by allowing tolling for class claims where there was no attempt to revive earlier class status that did not merit certification. *E.g., In Re Crazy Eddie*

(continued...)

One recent district court case that Andersen does not cite, but that merits attention, is *Alidina v. Penton Media, Inc.*, 143 F. Supp. 2d 363 (S.D.N.Y. 2001). There, the New York district court addressed and dismissed the conflict claim. The court distinguished the Second Circuit's opinion in *Korwek*, noting that while the underlying class in *Korwek* could not be certified, the securities fraud class proffered in *Alidina* clearly met the requirements of Rule 23.

Andersen fares no better in its fallback argument that there is a narrower split among the circuits. Andersen first contends that the Third Circuit's decision conflicts with the decisions of the Eleventh Circuit in *Griffin*, 17 F.3d 356, and the rationale for the Ninth Circuit in *Catholic Soc. Servs. Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000). *Griffin* is an anomaly in that a class was initially certified, but later, after a change in the law deprived the named plaintiffs of standing, the class was decertified by the district court. In affirming the denial of class status, the Eleventh Circuit noted that over a 15 year period more than 60 different named plaintiffs repeatedly attempted to assert a wide variety of individual and class claims. Without analysis, the *Griffin* court simply cited *Korwek, Salazar* and *Andrews* and their concerns over stacking a series of repetitive class actions and held that "Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely." 17 F.3d at 359. Andersen argues that *Griffin* is in

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(...continued)
Sec. Litig., 802 F. Supp. 804, 813 (E.D.N.Y. 1992); *Shields v. Smith*, No. C-90-0349 FMS, 1992 WL 295179, at *2-3 (N.D. Cal. Aug. 14, 1992).

direct conflict with the Third Circuit's decision here, but it is not because there is a fundamental distinction between the two cases. Unlike this case, in *Griffin* the class was originally certified. The Third Circuit observed that for that reason, *Griffin* may conflict with its earlier decision in *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083 (3d Cir. 1975), where the first class was also certified (App. 13a), but not with this case where initial certification was denied for reasons unrelated to the propriety of the underlying class.[5]

Nor does *Catholic Social Services* pose a conflict with the Third Circuit's decision here, not in its holding nor, contrary to Andersen's argument, in the rationale articulated by the Third Circuit for allowing tolling for the class claims. In *Catholic Social Services* the district court first properly certified a class, but after a change in the law deprived the named plaintiffs of a jurisdictional basis for their claims, a second class action was filed and also was certified. The majority held that the filing of the first class action tolled the limitations period for the later filed class action because the second class action *did not seek to relitigate the deficiency* that caused the earlier denial of class certification, thereby distinguishing the case before it from the court's earlier decision in *Robbin v. Fluor Corp.* Andersen ignores the fact that in the case under review there can be no dispute that Cutler's class

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[5] Since the decision in 1994, no court has cited *Griffin* approvingly on the issue of class tolling, and it remains a kind of concession to judicial exhaustion. "Fifteen years after the *Griffin* lawsuit was filed, the class action issues are still being litigated, and we decline to adopt any rule that has the potential for prolonging litigation about class representation *even* further." 17 F.3d at 359 (emphasis supplied).

action likewise *does not seek to relitigate the deficiency* that caused the earlier denial of certification. In the words of the *Catholic Social Services* majority, Cutler's class action does not seek "*to cure the deficiency* that led to the [earlier] denial" (232 F.3d (emphasis supplied))—namely Berger's inadequacy as a class representative. Quite the contrary, Cutler seeks to represent the same underlying class, a proper class under Rule 23, by replacing Berger as an adequate class representative.

The *Catholic Social Services* dissent, citing the four circuit court decisions Andersen relies on, focuses primarily on the risk of abuse to the courts and prejudice to the defendants that might flow from an endless succession of class actions that would toll the limitations period indefinitely. However, as we have noted, this is a false issue as the district courts are well equipped to prevent such abuses to the judicial system or prejudice to defendants, and they do so regularly on both a pragmatic and principled basis. Moreover, the dissent's concern over the specter of an endless succession of class actions is not present here, where the limitations period was tolled *only once* by the district court's rejection of Berger as class representative, after which Cutler promptly filed his motion to intervene individually and for the class.

Andersen's final fallback argument is that the Third Circuit misperceived the rationale for the *Korwek* line of cases, and its decision is in conflict with them by assuming those decisions are grounded on an issue preclusion rationale. However, Andersen tortures the basis for those decisions beyond recognition—they are not about issue preclusion, they are about potential abuses from relitigating certification after a class has

been definitively found to be defective.[6] Andersen's argument betrays the rigidity of the restricted tolling rule it would have the Court adopt, namely that once certification has been denied *no matter what the reason*, even where as here there is a valid underlying class, there can be no tolling for the putative class. There is no circuit conflict—either wide or narrow—over Andersen's proposed rule of law because no circuit has ever articulated such an absolute unyielding rule.

2. The Third Circuit's Decision Is Correct and Consistent with This Court's Rationale for Creating the Tolling Rule

In creating the tolling rule, this Court held that the rule is necessary to eliminate any necessity or incentive for absent class members to pursue their claims by intervening or filing their own complaint prior to a determination of whether a pending case can proceed as a class action. While Andersen asks the Court to reverse the Third Circuit's decision, the Petition, in reality, is a thinly disguised request that the Court reconsider its

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[6] On the issue of potential for abuse, we agree with Andersen that the tolling rule should not allow a succession of cases seeking reconsideration of a finding that the claims are inappropriate for class treatment or, as in *Griffin*, a series of plaintiffs attempting to relitigate their lack of standing. But, neither is the situation here. Nor does it present a serious problem for the courts because the district courts can preclude any such abuses. *E.g.*, *Shields v. Washington Bancorporation*, 1992 WL 88004, at *10 n.1 (the "equitable nature of the tolling doctrine insures that courts will be able to fashion appropriate responses to potential abuses of the doctrine by plaintiffs").

formulation of the tolling rule and severely restrict its application. As Andersen concedes in the Petition, it seeks a limitation that conflicts with the Court's reasons for creating the tolling rule. Andersen's proposed rule would "encourage" absent class members to make individual filings pressing claims that are already the subject of a pending class action complaint. (Petition at p. 10.) That result is antagonistic to what this Court accomplished by establishing the tolling rule.

In *American Pipe*, the Court created the tolling rule because it was "convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations *as to all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 553-54 (emphasis supplied). "A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is the principal purpose of the procedure." *Id.* at 553.

This Court had the opportunity to limit the scope of the tolling rule in *Crown, Cork & Seal Co.*, 462 U.S. at 350-51, but, instead, concluded that the rule "is not to be read so narrowly" that it would result in the needless multiplicity of actions that the Court created the tolling rule to avoid. The Court concluded that the tolling rule must be read to eliminate "every incentive to file a separate action prior to the expiration of [each absent class member's] own period of limitations." *Id.* at 349.

The severe limitation on the tolling rule that Andersen proposes, that one denial of class certification *for any*

reason will prohibit class tolling, would create a strong incentive for class members to file separate actions or intervene in the pending action prior to the class certification decision in order to protect their ability to pursue their claims. Andersen's argument should be rejected as inimical to the Court's basis for creating the tolling rule.

Andersen acknowledges that the tolling rule was created to eliminate any incentive for absent class members to take action prior to the certification decision. Despite that recognition, Andersen also acknowledges that its proposed limitation on the tolling rule will "encourage" absent class members to intervene or file their own action. ("*To be sure*, a rule that denies tolling for class claims may encourage additional filings in the early stages of class litigation" (emphasis supplied).) (Petition at p. 10.) Andersen's limitation cannot be reconciled with the Court's stated purpose of the tolling rule.

Andersen's proposed limitation is seriously flawed because it ignores the realities of the well-recognized necessity for class actions. This Court has consistently held that Rule 23 has an important remedial purpose and is necessary to enable claims too small to be pursued separately to be joined together. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997) ("[The drafters of Rule 23] had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" (citation omitted)); *Deposit Guaranty Nat'l Bank*, 445 U.S. at 339 ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."). As the Third Circuit emphasized in the case under review, "[c]lass actions

are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.'" (App. 5a (citations omitted).)[7]

Andersen acknowledges that "Rule 23 was designed to resolve such common disputes efficiently by allowing a 'truly representative suit' which would avoid the need for multiple filings to adjudicate multiple claims." (Petition at p. 10 (citing *American Pipe*, 414 U.S. at 550-53).) Andersen's proposed rule, however, would accomplish the opposite. Where a court has denied class certification because the representative was inadequate, and not because of any defect in the underlying class, allowing an absent class member to intervene and resolve the common dispute through the class mechanism, in a "truly representative claim," accomplishes the goal of Rule 23. Forcing absent class members to pursue separate individual claims solely because the initial proposed representative was found inadequate would frustrate that explicit purpose of Rule 23. That would be a particularly poor result here where the class claims are garden variety securities fraud claims unmistakably appropriate for class treatment, a fact confirmed by the district court when it found that the class satisfied the numerosity and commonality requirements. (App. 4a.)

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[7] In its seminal set of articles devoted to class actions, the Harvard Law Review anticipated this issue, observing that because the "cost of legal assistance" precludes absent class members from pursuing their claims individually, "protection of absentee access rights seems to require that, if a proper class suit is brought after an improper one is dismissed, such a suit should not be time-barred so long as the defendants received the proper notice." *Developments in the Law - Class Actions*, 89 Harv. L. Rev. 1318, 1450 n.291 (1976).

Further, the Third Circuit's application of the tolling rule is consistent with the Court's rationale for creating the rule in the two seminal cases *American Pipe* and *Crown, Cork & Seal*, where in each case the underlying claim itself was inappropriate for class treatment. In *Crown, Cork & Seal*, the Court quoted its prior decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 474-75 (1975) (Marshall, J. joined by Douglas and Brennan, JJ., concurring in part and dissenting in part) regarding the proper interpretation of the tolling rule. " 'In *American Pipe* we held that initiation of a timely class action tolled the running of the limitations period as to individual members of the class, enabling them to institute separate actions *after the District Court found class action an inappropriate mechanism for the litigation.*' " 462 U.S. at 352 n.5 (emphasis supplied) (citation omitted). Andersen's assertion that the Court intended the tolling rule to allow *only* individual actions after an initial denial—regardless of whether the class mechanism is appropriate or not—is inconsistent with the Court's explanation in *Johnson* where the Court focused on the situation where the underlying class was *not* suitable for certification.

The Third Circuit's application of the tolling rule here is consistent with this Court's formulation of the tolling rule because it does not prejudice Andersen's interests protected by the statute of limitations. The statute of limitations' purposes are satisfied because "[w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation." *American Pipe*, 414 U.S. at 555; *Crown, Cork & Seal*, 462 U.S. at 353 ("Tolling the statute of limitations thus creates no potential for unfair surprise, regardless

of the method class members choose to enforce their rights upon denial of class certification.").

Further, since it is well-established that the tolling rule applies to preserve *each class members' individual claim*, whether those claims are pursued separately, or jointly as a class action, has no impact on a defendant with respect to an interest that statutes of limitation are designed to protect. Under either scenario, the defendant would be subject to the same liability, and, in Andersen's hypothetical world, it would not matter to a defendant whether the tolling rule allows for class actions.[8] However, in the real world, the only reason it matters to Andersen is that the vast majority of individual claimants cannot economically pursue Andersen and other culpable defendants, thereby insulating them from substantial damage awards. See *Amchem*, 521 U.S. at 616; *Deposit Guaranty Nat'l Bank*, 445 U.S. at 339. That is not an interest to be protected by the statutes of limitation.

Andersen's final policy argument is that its proposed restriction of the tolling rule is necessary for the Court to prevent the "abuse" of "prolong[ing] the period for

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[8] In fact, in *Crown, Cork & Seal*, this Court explained that the "defendant may prefer not to defend against multiple actions in multiple forums," and, given that the underlying class was defective, other mechanisms to consolidate the cases should be considered. 462 U.S. at 353. Where, as here, class certification is denied because the representative was inappropriate, but the underlying class is valid, precluding the absent class members, the district court, and the defendant from using the most efficient consolidating rule to consolidate the absent class members' claims, i.e. class actions pursuant to Rule 23, would lead to pointless inefficiency.

bringing class claims," as Andersen claims the Court warned of in *American Pipe* and *Crown, Cork & Seal.* (Petition at p. 12-13.) Andersen's recitation is wrong. The actual abuse the Court warned of was the extension of the tolling rule to claims pursued by absent class members of which the defendant *did not receive notice* in the class action complaint. 462 U.S. at 354-55. That potential "abuse" has no relevance here, where Cutler, as class representative, is pursuing class certification for securities fraud claims identical to the claims previously raised by Berger on behalf of the same putative class.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

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November 12, 2002